Filed 5/4/10 Ross v. Frank CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

CHERYL ROSS, Plaintiff and Respondent, v. KEVIN FRANK et al., Defendants and Appellants.	B211125 (Los Angeles County Super. Ct. No. BC366137)

APPEAL from an order of the Superior Court of Los Angeles County. Terry A. Green, Judge. Affirmed.

Morgan, Lewis & Bockius, Robert Jon Hendricks and Mustafa El-Farra for Defendants and Appellants.

Mancini & Associates, Marcus A. Mancini, Christopher Barnes; Benedon & Serlin, Gerald M. Serlin and Shona L. Armstrong for Plaintiff and Respondent.

In this action for violations of the Fair Employment and Housing Act (FEHA) the trial court awarded judgment to four non-employer defendants but denied their motion for attorney fees under Government Code section 12965, subdivision (b) which authorizes the court, in its discretion, to award attorney fees to the prevailing party. On appeal, these defendants contend that the court abused its discretion in denying them attorney fees. They argue that the court should have awarded them fees because plaintiff's FEHA causes of action were "'unreasonable, frivolous, meritless, or vexatious,'" plaintiff failed to show she could not afford to pay the amount demanded, and because in ruling on the motion the court erroneously considered a confidential settlement agreement between the plaintiff and the defendants' employer. Alternatively, defendants contend they are entitled to attorney fees incurred in having to prove the truth of matters in their requests for admissions that were denied by plaintiff. (Code Civ. Proc., § 2033.420.)

We affirm the order denying attorney fees.

FACTS AND PROCEEDINGS BELOW

In April 2005, plaintiff Cheryl Ross, an African-American, became employed by LowerMyBills, a company that provides mortgage lenders with information about consumers who are interested in obtaining home loans. Plaintiff's responsibilities included obtaining credit reports, collecting debts, calling customers and conducting research. LowerMyBills terminated plaintiff's employment in January 2006. She then filed this action against LowerMyBills and several supervisors and coworkers, alleging racial and sexual harassment, discrimination and retaliation in violation of the FEHA.[1] This appeal only pertains to the claims against supervisor-defendants Yolanda Diaz, Kevin Frank and James Gee and coworker Ruth Katz. (We will refer to Diaz, Frank, Gee and Katz collectively as "the defendants.")

Plaintiff alleged that she complained to Diaz about harassment by a coworker but instead of taking action on her behalf, Diaz retaliated against plaintiff by terminating her

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1 The complaint alleged other torts but they are not relevant to this appeal.

employment. The court sustained Diaz's demurrer to the compliant without leave to amend after our Supreme Court held that nonemployer individuals are not personally liable for retaliation under the FEHA. (*Jones v. Lodge at Torrey Pines Partnership* (2008) 42 Cal.4th 1158, 1173 (hereafter *Jones*).)

Plaintiff also alleged racial and sexual harassment by Gee and Katz and retaliation by Gee and Frank but the court granted these defendants' motions for summary judgment. The court found that the only evidence upon which plaintiff based her claim for sexual harassment against Katz, Katz's remark that "I can't help but staring at your cleavage," did not support a claim of sexual harassment. Likewise, the court found that the only evidence upon which plaintiff based her claim for racial harassment against Gee, Gee's asking plaintiff why she decorated her cubicle at Christmas with a black Santa Claus, did not amount to racial harassment. As to the retaliation claims against Gee and Frank, the court held they were barred as a matter of law because pursuant to *Jones*, *supra*, 42 Cal.4th at page 1173, a nonemployer cannot be held personally liable for retaliation.[2]

After obtaining judgments against plaintiff, the defendants moved for attorney fees under the FEHA provision which authorizes the court, in its discretion, to award costs and fees to the prevailing party. (Gov. Code, § 12965, subd. (b).) The defendants maintained that they should be awarded attorney fees in the sum of $204,723 because plaintiff's allegations of retaliation were barred by *Jones*, *supra*, 42 Cal.4th 1158, her allegations of harassment were frivolous and plaintiff had pursued these causes of action after discovery showed they were factually without merit. Alternatively, defendants sought attorney fees under Code of Civil Procedure section 2033.420, subdivision (a) as a penalty for plaintiff refusing defendants' requests that she admit her claims of retaliation and harassment against all defendants were "false."

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2 Plaintiff alleged additional acts of sexual and racial harassment by other coworkers. We need not discuss these allegations because these coworkers were not parties to the proceedings at issue here.

Plaintiff responded that in FEHA cases the courts have held that attorney fees should be awarded to the defendant only if the plaintiff's litigation conduct was egregious or the case was patently baseless for objective reasons. She argued hers was not such a case. She maintained that she made her allegations in good faith and, when discovery showed that some were mistaken and some could not be proved, she attempted to amend her complaint to withdraw those allegations. It was defendants, not she, who prolonged this litigation by objecting to her filing an amended complaint and insisting on pursuing their demurrer and motions for summary judgment on the original complaint. Plaintiff also opposed the attorney fees motion on the ground that she had "no ability to pay an attorneys fee judgment."

The court denied the defendants' motion for attorney fees. It found that the allegations in the original complaint were sufficient to state causes of action under the FEHA and that, following discovery, plaintiff had attempted to amend her complaint to withdraw some of the allegations challenged by the defendants. The court also noted that the defendants' employer, LowerMyBills, had reached a settlement with plaintiff.

DISCUSSION

I. DEFENDANTS' CLAIM FOR ATTORNEY FEES UNDER THE FEHA

In FEHA cases, "the court, in its discretion, may award to the prevailing party reasonable attorney's fees and costs . . . ." (Gov. Code, § 12965, subd. (b).) It is undisputed that the defendants were the prevailing parties in this action.

We examine the trial court's ruling on a fee request for abuse of discretion. (*Chavez v. City of Los Angeles* (2010) 47 Cal.4th 970, 989.) In doing so we recognize that the court's decision whether to grant attorney fees will not be disturbed on appeal unless it is clearly wrong, i.e. wholly arbitrary or lacking any basis in substantial evidence. (*PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1095.) We also bear in mind that the question before us is not whether there were grounds which could have supported an award of attorney fees to the defendants but whether the court abused its

discretion in *not* awarding such fees. In this case we cannot say there was an abuse of discretion.

There are at least two factors that support the trial court's denial of attorney fees to defendants.

As our Supreme Court recognized in *Serrano v. Unruh* (1982) 32 Cal.3d 621, 635, "[a] fee request that appears unreasonably inflated is a special circumstance permitting the trial court to reduce the award or deny one altogether." (Fn. omitted.) (See e.g., *Farris v. Cox* (N.D.Cal. 1981) 508 F. Supp. 222, 227 [fee petition denied for "overreaching"].)

Here the trial court found that the defense in "[t]his case has been overlitigated, way, way, overlitigated" and noted that defense counsel had taken a "super-aggressive stance . . . in this case." The court appears to have had two incidents in mind. At her deposition, defendant Diaz, on the advice of counsel, refused to disclose her home address for purpose of service of the summons and complaint, or to allow LowerMyBills to accept service on her behalf, on the ground that, in her counsel's opinion, the complaint failed to state a cause of action against her.[3] In the second incident, defendants objected to Ross filing an amended complaint following the *Jones* decision and insisted on pursuing their demurrer and motions for summary judgment on the original complaint.

As a separate and independently sufficient reason for denying attorney fees to the defendants, the court had before it a declaration from plaintiff stating that she had "no ability to pay an attorneys fee judgment." Regardless of the merits of the plaintiff's action, in ruling on the defendants' request for attorney fees the court must consider the plaintiff's ability to pay. (*Villanueva v. City of Colton* (2008) 160 Cal.App.4th 1188, 1203-1204.) The *Villanueva* court reasoned that: "Because the majority of cases under the FEHA involve litigants who would not have the financial means to prosecute this type

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3 The trial court ordered LowerMyBills to produce Diaz's home address or accept service on her behalf. LowerMyBills petitioned for a writ of mandate vacating the trial court's order. We denied the petition in an unpublished order.

of case, the public policy behind the FEHA is served by not discouraging them from pursuing the litigation by potentially imposing fees that could easily devastate them financially simply because a few file frivolous claims. Thus, a plaintiff's ability to pay must be considered before awarding attorney fees in favor of the defendant." (*Id*. at p. 1203.)

Although the trial court did not explicitly rely on plaintiff's inability to pay, under the deferential abuse of discretion test, "we must uphold the trial court 'ruling if it is correct on any basis, regardless of whether such basis was actually invoked.'" (*Montenegro v. Diaz* (2001) 26 Cal.4th 249, 255.) Plaintiff filed a declaration in opposition to defendants' attorney fees motion in which she stated that since being terminated by LowerMyBills she had worked briefly for two other employers, had become disabled, received disability benefits and is presently receiving unemployment benefits. She declared that she had "no ability to pay an attorneys fee judgment." Plaintiff's declaration provides a sufficient factual basis for the denial of defendants' motion for attorney fees.

Defendants argue that plaintiff's declaration does not show her inability to pay a $200,000 attorney fees award because it does state the amount of her unemployment benefits or her assets. Defendants speculate that "[p]laintiff could have hundreds of thousands of dollars in her bank account and/or may own property." We are not bound to accept defendants' speculation and given her employment and disability history it is not unreasonable to credit her statement that she had "no ability to pay an attorneys fee judgment" If defendants doubted plaintiff's declaration they could have deposed her regarding her income and assets. (*Oak Grove School Dist. v. City Title Ins. Co.* (1963) 217 Cal.App.2d 678, 708-713.) They did not do so.

II. DEFENDANTS' CLAIM FOR ATTORNEY FEES UNDER THE DISCOVERY ACT

As an alternative ground for an award of attorney fees, defendants argue they are entitled to fees under Code of Civil Procedure section 2033.420 for having to prove facts that plaintiff denied in her response to defendants' requests for admissions.

Defendants propounded requests for admissions asking plaintiff to admit that the allegation in her complaint "that 'defendants, and each of them, . . . retaliated against . . . plaintiff Ross' is false" and that the allegation in her complaint "that 'defendants, and each of them, harassed . . . plaintiff Ross' is false." Plaintiff denied these requests. Consequently, defendants contend they are entitled to the attorney fees incurred in proving that plaintiff's allegations of retaliation and harassment were "false." Defendants rely on Code of Civil Procedure section 2033.420 which states: "(a) If a party fails to admit . . . the truth of any matter when requested to do so under this chapter, and if the party requesting that admission thereafter proves . . . the truth of that matter, the party requesting the admission may move the court for an order requiring the party to whom the request was directed to pay the reasonable expenses incurred in making that proof, including reasonable attorney's fees. [¶] (b) The court shall make this order unless it finds any of the following: [¶] (1) An objection to the request was sustained or a response to it was waived under Section 2033.290; [¶] (2) The admission sought was of no substantial importance; [¶] (3) The party failing to make the admission had reasonable ground to believe that that party would prevail on the matter; [¶] (4) There was other good reason for the failure to admit."

Defendants' claims for attorney fees under Code of Civil Procedure section 2033.420 fail for two reasons: (1) defendants did not prove that they did not retaliate against or harass plaintiff—they only showed that plaintiff could not prove that they did (see *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 854-855); (2) even if defendants proved that they did not retaliate against or harass plaintiff they did not prove

that the other defendants named in the action did not do so as required by their requests that plaintiff admit her allegations against *all* defendants were false.[4]

DISPOSITION

The order is affirmed. Respondent is awarded her costs and reasonable attorney fees on appeal.

NOT TO BE PUBLISHED.

ROTHSCHILD, J.

We concur:

MALLANO, P. J.

JOHNSON, J.

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[4] Because we have found sufficient grounds for the court's decision to deny attorney fees to the defendants we need not consider whether the court erred in also considering plaintiff's settlement with her former employer. (See Evid. Code, § 1152, subd. (a).)